No. 86 1912

Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

v.

FRED HOLLY, et ux, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a tribal code provision expressly sets forth the disputed tribal authority, does an exception exist to this Court's exhaustion-of-remedies requirement, so that a district court should address the question of tribal powers before the tribal remedies are exhausted or the tribal powers are exercised?

2. Whether a district court may pass on the validity of an Indian tribe's water code regulating waters within a reservation in an action brought against individual members of the governing body promulgating the code?

LIST OF PARTIES

The following respondents were parties to the proceedings below: Fred Holly and Marian Holly, husband and wife; Herman R. Kuhnhausen and Violet R. Kuhnhausen, husband and wife; Darryl G. Lloyd and Susan H. Lloyd, husband and wife; Kenneth D. Sheridan and Frieda R. Sheridan, husband and wife; Russell L. Sprague and Isoline Sprague, husband and wife; Leon A. Conboy, a single person; Ada M. Conboy, a single person; Norman E. Troh and Anna E. Troh, husband and wife; Herman F. Kuhnhausen and Carrie H. Kuhnhausen, husband and wife; Arthur Ladiges and Mary Ladiges, husband and wife; Vern G. Addington and Mary Anita Addington, husband and wife; Paul Ladiges and Mary K. Ladiges, husband and wife; Harry C. Miller and Christine Miller, husband and wife; Douglas E. Troh and Anne Marie Troh, husband and wife; Roger T. Kuhnhausen and Carol E. Kuhnhausen, husband and wife; Nile L. Garrett and Ruby Garrett, husband and wife; Albert Booher and Thelma Booher, husband and wife; Daniel Holly and Sylvia Holly, husband and wife; Art Schuster and Charl Schuster, husband and wife; George Hathaway and Dee Hathaway, husband and wife; Francis T. Bean and Katherine N. Bean, husband and wife; Robert Seagle and Anita L. Seagle, husband and wife; James P. Clemmer and Jeanette Clemmer, husband and wife; Larry E. Kelley, a single person; Steve Kelley, a single

person; S. Wayne Vinyard, a single person; Henry Ladiges, Jr. and Lorene Ladiges, husband and wife; DeRowland Ward and Lela G. Ward, husband and wife; Jack H. Grubb and Norma J. Grubb, husband and wife; Delmar Q. Allbritton and Eula Allbritton, husband and wife; Public Utility District No. 1 of Klickitat County; the State of Washington; the City of Toppenish and the City of Wapato, Washington; the Washington State Department of Fisheries and the Washington State Department of Game.

The following petitioners were parties to the proceedings below and are involved in this petition: Watson Totus; Johnson Meninick; Joe Sampson; Roger Jim; Moses Dick Jr.; William Yallup; Harvey Adams; Anthony Washines; Mel Sampson; William Hoptowit; Levi George; Harris Teo; Russell Jim; Nelson Moses; Matt Goudy Jr.; Virginia Harrison; and Leonard Tomaskin.

The originally named defendants in the district court were the Confederated Tribes and Bands of the Yakima Indian Nation (hereinafter called the "Yakima Indian Nation"), the Yakima Tribal Council, one of the Yakima Nation's governing bodies, the Yakima Tribal Court and its Chief Judge, and the petitioners in their individual and official position. The Yakima Indian Nation, its governing Tribal Council, and the Yakima Tribal Court and Judge were dismissed from the case and the action continued individually against

the above-named petitioners who were named as defendants in their individual and official capacity in the Eastern District proceedings. Relief was awarded against the above named individual petitioners, some of whom were elected officials of the Yakima Indian Nation at the time of the enactment of the Yakima Indian Nation's Water Code.

The Confederated Tribes and Bands of the Yakima Indian Nation is comprised of fourteen originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their treaty relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered "one nation" and specified lands located in the Territory of Washington would be set aside for their exclusive use. The treaty was ratified by Congress in 1859. *Treaty with the Yakimas*, 12 Stat. 951. Since that time, the Yakima Nation has maintained its tribal identity without interruption. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 469 (1979).

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IN THE

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OCTOBER TERM, 1986

WATSON TOTUS, et al.,

Petitioners,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, individual members of the Yakima Indian Nation (herein called "Members"), respectfully pray that a writ of certiorari issue to review the judgment and opinion, entered in these proceedings on March 3, 1987, by the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The March 3, 1987 opinion of the Ninth Circuit (Table—812 F.2d 714) is unreported and is reprinted as Appendix A hereto, p. 1a, *infra*. The referenced opinion of the Ninth Circuit filed October 22, 1984 is

not reported and is reprinted as Appendix B hereto, p. 8a, *infra*.

The September 6, 1985 Memorandum and Order Granting Motion for Summary Judgment and the November 20, 1985 Order Denying Motion to Amend Except for Nunc Pro Tunc Corrections of September 6, 1985 Memorandum and Judgment of the Eastern District have not been reported. They are reprinted as Appendix C hereto, p. 12a, *infra*.

The January 31, 1979 Memorandum and Order of the Eastern District dismissing the Yakima Indian Nation, its governing Tribal Council, and the Yakima Tribal Court and Judge from the case and limiting the action against named tribal officials in their individual (and not official) status has not been reported. It is reprinted as Appendix D hereto, p. 24a, *infra*.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §§ 1331, 1343 and 2201, the respondents (then plaintiffs) sought to declare the Yakima Nation's Water Code void and enjoin its enforcement in the Eastern District of Washington. After the dismissal of the Yakima Nation, its Tribal Council, Court and Tribal Officials in their official capacity, the action continued against Members. The suit against these Members concerned them only as individuals residing, like the plaintiffs, in the State of Washington and was not continued against them in their official capacity. Petitioners have

challenged federal jurisdiction at all stages of these proceedings. On September 6, 1985, the Eastern District granted one of the respondents' motion for summary judgment declaring that these Members did not have authority to enforce a water code declared to be invalid as regards certain waters. On the appeal of Member petitioners, the Ninth Circuit, on March 3, 1987, entered an opinion affirming the Eastern District's order and judgment. This petition for writ of certiorari is filed within ninety (90) days of March 3, 1987. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED

Involved portions of the treaties and statutes are reprinted in the appendixes hereto. The Preamble and an excerpt of Article II of the *Treaty with the Yakimas* are reprinted as Appendix E, p. 33a, *infra;* 25 U.S.C. §§ 1302 and 1303 are reprinted as Appendix F, p. 36, *infra;* 28 U.S.C. §§ 1331, 1343 and 2201 are reprinted as Appendix G, p. 38a, *infra.*

STATEMENT OF THE CASE

This case arises from the efforts of landholders within the Yakima Indian Reservation to have the Yakima Nation's Water Code declared null and void as regards waters on reservation non-trust lands. This case was commenced in the Eastern District against the Yakima Indian Nation, its Tribal Court and Judge,

and certain tribal officials, individually and in their official capacity.

On a motion to dismiss, the Eastern District determined that, because of the doctrine of sovereign immunity, it had no jurisdiction over the Yakima Indian Nation, its Tribal Council, its Tribal Court, or over tribal officials in their official capacity. *See* App. D. p. 26a, *infra.*

On amended and intervenor complaints, the case continued against Members in their individual capacity. These Members had been tribal officials at the time of the enactment of the Yakima Nation's Water Code and some of them had been on the Tribal Council that passed the Code. No other action had been taken by these Members against any respondent. On September 17, 1983, the Eastern District granted a motion for summary judgment and declared the Yakima Water Code void and unenforceable because an inapplicable penal provision was not expressly severable. In due course, this order and judgment were appealed to the Ninth Circuit by Members. On this first appeal, Members challenged the determination that a provision in the Yakima Nation's Water Code, which was not applicable to non-Indians, invalidated the Code in its entirety. Further, Members pressed the raised threshold issues of justiciability, standing, legislative and tribal immunity, and exhaustion as bars to the determination of invalidity by the Eastern District. In

its decision of October 22, 1984, the Ninth Circuit affirmed the Eastern District on these threshold issues, but reversed the Eastern District's determination that the inapplicability of the penal section voided the Code. *See* App. B, p. 9a, *infra.*

On remand and on September 6, 1985, the Eastern District on Summary Judgment by Memorandum and Order Granting State's Motion for Summary Judgment, as corrected by its Order of November 20, 1985, determined that the Yakima Nation's Water Code was invalid as to its regulation of non-member use of "excess" waters and declared that petitioning Members did not possess authority to enforce the void provisions. *See* App. C, p. 19a, *infra.*

In due course, this determination and judgment were appealed to the Ninth Circuit. On this second appeal, the Ninth Circuit again rejected the following issues raised by petitioners: (1) whether the doctrine of immunity protects Members from this suit; (2) whether this suit is premature because tribal remedies were not exhausted; and, (3) whether a justiciable case and controversy has been presented. Further, in its Memorandum of March 3, 1987, the Ninth Circuit determined that the Yakima Water Code is invalid to the extent it purports to bestow tribal regulatory powers over the use of "excess" waters and affirmed the Eastern District. *See* App. A, p. 2a, *infra.*

It is agreed that the Yakima Nation and its mem-

bers have reserved treaty water rights to the use of waters within the exterior boundaries of the Yakima Indian Reservation. *See* App. H, p. 44a, *infra.* It is agreed that the Yakima Indian Nation has promulgated that all of the waters that underlie, arise upon or flow through or along the border of the Yakima Indian Reservation are reserved for the beneficial use of its members as needed. *See* App. H, p. 44a, *infra.* This is the provision that the Eastern District and the Ninth Circuit claim exempts this action from this Court's exhaustion of tribal remedies requirement. It is agreed that, in 1982, parts of these waters were used both within and outside the boundaries of the reservation by non-Indians. *See* App. H, p. 44a, *infra.* It is agreed that the Yakima Indian Reservation, exclusive of the Glenwood area, contains 1,223,844 acres, and 1,121,220 of these acres are held in trust by the Unitetd States for the Yakima Nation and other Indian allottees. Indians hold fee lands within this main portion of the reservation in the amount of 3,202 acres, and non-Indians hold 99,422 acres. *See* App. H, p. 42a, *infra.* (E.R. p. 235; C.R. 108.) In the Glenwood area approximately 97,909 acres of the 100,457 acres are patented. *See* App. H, p. 42a, *infra.*

It is agreed that the non-governmental respondents are non-Indian citizens of the State of Washington who claim ownership of land within the reservation and are users of water in the Glenwood area. The State of

Washington also claims ownership of land and water rights in the reservation and is a user of water within the reservation. Some plaintiffs hold state permits and claim a right to use water based on state law, while others claim rights to use water based on a state adjudication decree wherein none of the defendants or the Yakima Nation was a party. *See* App. H, p. 43a, *infra.*

The Yakima Indian Nation has promulgated a water code (Resolution No. T-79-77) to administer reserved waters within the Yakima Indian Reservation. This is the document in question and is referred to herein as the "Yakima Nation's Water Code" or "Water Code". It is agreed that petitioners, then members of the Yakima Tribal Council, collectively prepared, promulgated and made effective the Yakima Nation Water Code. *See* App. H, p. 40a, *infra.*

It is agreed that the Yakima Nation Water Code has not, at any time, before the commencement of this suit or thereafter, been enforced by the Yakima Indian Nation against any of the respondents. *See* App. H, p. 45a, *infra.*

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit opinions directly conflict with the rule of this Court declaring it is premature for a district court to determine limits to tribal powers of self-government before tribal remedies are exhausted.

This Court has made it clear in *National Farmers*

Union Insurance Company v. Crow Tribe, 471 U.S. 845 (1985), and later in *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. __, 94 L.Ed.2d 10, 107 S. Ct. 971 (1987), that it is premature for a district court to determine that an Indian tribe has exceeded the lawful limits of its authority until available tribal remedies have been exhausted. In announcing and discussing this exhaustion rule, this Court noted that the Court-recognized congressional policy supporting tribal self-government and self-determination favors this exhaustion requirement. *National Farmers Union, supra*, at 471 U.S. 857, *et seq.; Iowa Mutual Insurance Co., supra*, at 94 L.Ed.2d 18, *et seq.*

As this Court has noted, this rule follows the Federal policy regarding tribal self-government, provides for orderly administration of justice, limits procedural problems, encourages the tribal courts to explain their basis for jurisdiction, and provides reviewing courts with the benefit of the tribal proceedings and expertise. *Id.* We further note that this rule also favors the availability of justice and conservation of federal judicial resources supported by this Court. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817, 820 (1976).

The wisdom of this exhaustion rule can be clearly demonstrated by the instant case. The only action that has been taken by petitioning Members is the enactment of the Yakima Nation's Water Code. A Water Board,

composed of a non-member majority, was established by the Code to administer its provisions. No action has ever been taken by petitioning Members, or any other agent of the Yakima Nation, against any of the respondents or any water user, that has limited their use of waters within the Yakima Indian Reservation. However, without taking any action to exhaust their remedies before this Water Board or the Tribal Court, this action was brought in the Eastern District. The Yakima Nation has never had an opportunity to determine if there are "excess" waters or if it wishes to regulate their use. The action was brought and sustained by both the Eastern District and the Ninth Circuit on the basis that the power to assert authority over these "excess" waters was expressly asserted by the Yakima Nation's Water Code and that any interpretation by a tribal forum would be futile. No proof of the futility was provided or offered. This action against the Members, who only promulgated the Water Code, has been most premature and damaging to the political integrity of the Yakima Indian Nation.

The decisions announced by the Ninth Circuit provide, that where a tribal code expressly asserts disputed authority, no exhaustion of remedies is required. (App. B, p. 10a.) This Court has indicated that exhaustion would not be required where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; or (2) where exhaustion

would be futile because of a lack of adequate opportunity to challenge the court's jurisdiction. *National Farmers Union, supra,* at 471 U.S. 856, n21; *Iowa Mutual Insurance Co., supra,* at 480 U.S. __, 94 L.Ed.2d 22, n12. These exemptions do not exist here.

This ruling of the Ninth Circuit undermines tribal self-government, thus violating policy recognized and fostered by this Court. This right of self-government was implicitly and explicitly guaranteed to the Yakima Nation by treaty, and is within the Federal Government's longstanding policy of encouraging tribal self-government. The *Treaty with the Yakimas,* 12 Stat. 951, clearly states that the signatory fourteen tribes and bands for the "purpose of this treaty are to be considered one nation". In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 560-561, this Court determined that the use of the treaty term "nation" called for the retention of powers of self-government like other nations.

The *Treaty with the Yakimas, supra,* set the Yakima Indian Reservation apart for the exclusive use of the Yakimas. This Court determined that this language provided for internal affairs remaining exclusively with the tribal government. *Williams v. Lee,* 358 U.S. 217, 221 (1958). Far from being an anomoly, the Yakima Nation's reserved right to control its internal affairs may be more clear than that of other tribes. From *Worcester v. Georgia, supra,* through *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332

(1983), this Court has emphasized that Indian tribes constitute "political communities", enjoying substantial "sovereign" powers over both members and non-members within their reservations. Looking only to the last twenty-five years, this Court has made this point no less than a dozen times. *See: Williams v. Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 690-692 (1965); *Kennerly v. District Court*, 400 U.S. 423, 426-427 (1971); *United States v. Mazurie*, 419 U.S. 544, at 557-558 (1975); *United States v. Antelope*, 430 U.S. 641, 645 (1977); *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 151 (1980); *Montana v. United States*, 450 U.S. 544, 565-566 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 146-148 (1982); *Ramah Navajo School Board, Inv. v. Bureau of Revenue*, 458 U.S. 832, 837-838 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-336 (1983).

Strong federal policy and comity concerns favor exhaustion of remedies in a non-federal forum, before the federal judiciary is burdened with such a determination. If the exception outlined in the Ninth Circuit decisions is to be established, it is an important

queston requiring plenary determination by this Court.

II. The Ninth Circuit opinion directly conflicts with the rule of this Court declaring that, absent congressional act or intent, Indian tribes possess immunity from suit

This Court has made it clear in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978), and cited cases therein, that Indian tribes have long possessed the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty is subject to the plenary control of Congress. *Id.*

Relying solely on an out-of-context phrase from *Santa Clara Pueblo v. Martinez, supra,* the Ninth Circuit determined that a district court may pass on the validity of the Yakima Nation's Water Code because the action is against the individual tribal officers. (App. B, p. 9a, "Nor are individual tribal officers 'protected by the tribe's immunity from suit.' *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 59 (1978)."

In so holding, the Ninth Circuit ignores the rest of the opinion and this Court's prohibition against doing indirectly what cannot be done directly by bringing a suit against tribal officials rather than the tribe. This Court's direct holding is that a federal action for declaratory and injunctive relief against tribal officers to determine the validity of a tribal ordinance is not authorized. *Santa Clara v. Martinez,* 436 U.S. 49, 62-67, 72 (1978). This Court clearly provided guid-

ance on this point for the federal courts which the Ninth Circuit chose to ignore. In a lengthy discussion, this Court pointed out that Congress has power to authorize civil action against tribal officers and does so by providing exclusive habeas corpus relief in the enactment of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1302-1303. *See* App. F, p. 36a, *infra*. This Court further held that actions for declaratory or injunctive relief are not authorized against either a tribe or its officers until Congress expressly grants this remedy. *Id.*

This specific rule is in conformity with this Court's general rule regarding compulsion in the form of junctive or declaratory relief, though nominally directed against an individual officer. In such a case the suit is barred, because the suit is really against the sovereign over which the court, in the absence of consent, has no jurisdiction. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949).

It is clear that the Ninth Circuit has attempted to do indirectly what the Eastern District correctly held it could not do directly. (Memorandum and Order dated January 31, 1979 determining that this action could not be brought against the Yakima Nation, its Tribal Council, its Tribal Court and Judge, or over tribal officials in their official capacity. App. D, p. 26a.) The Ninth Circuit decision violates the holdings of this Court.

CONCLUSION

The petition for writ of certiorari should be granted. If the decisions discussed herein provide sufficient guidance as to the questions raised, the judgment of the Ninth Circuit should be remanded for reconsideration in light of this Court's instructions. Otherwise it should be heard on the merits here, the judgment of the Eastern District and the Ninth Circuit decision vacated and remanded for dismissal of the action.

Respectfully submitted,

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May 29, 1987

APPENDIX

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-4436 — D.C. No. CV 78-02-JLQ

FRED HOLLY and MARIAN HOLLY, husband and wife; HERMAN R. KUHNHAUSEN and VIOLET KUHNHAUSEN, husband and wife; DARRYL G. LLOYD and SUSAN H. LLOYD, husband and wife; KENNETH D. SHERIDAN and FRIEDA R. SHERIDAN, husband and wife; et al.,

Plaintiffs/Appellees,

and

CITY OF TOPPENISH and CITY OF WAPATO, Washington, municipal corporations,

Plaintiffs/Intervenors,

v.

WATSON TOTUS; JOHNSON MENINICK, Vice Chairman; JOE SAMPSON, ROGER JIM, MOSES DICK JR., WILLIAM YALLUP, HARVEY ADAMS, et al.,

Defendants/Appellants.

On Appeal from the United States District Court for the Eastern District of Washington

Hon. Justin L. Quackenbush, District Judge, Presiding.

Argued and Submitted — December 3, 1986
Seattle, Washington

Filed — Mar - 3 1987

MEMORANDUM*

* This disposition is not intended for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: BROWNING, WRIGHT, and BOOCHEVER, Circuit Judges.

In this appeal we will initially address the Council's claims regarding the law of the case doctrine before delving into the Council's central argument.

Law of the Case

The Council raises three issues that were settled by this court on the first appeal: (1) whether the doctrine of immunity protects the council members from this suit, (2) whether this suit is premature because the state did not exhaust the tribal remedies, and (3) whether a justiciable case and controversy has been presented. The Council argues that on the first appeal, the panel did not wish its October 12, 1984, memorandum to be precedent for any purpose. Under Ninth Circuit Rule 21, however, a memorandum is precedent when relevant under the doctrine of law of the case. That doctrine prevents one panel of an appellate court generally from reconsidering a question that another panel has decided on a prior appeal in the same case. *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979). "[T]he prior decisions of legal issues should be followed on a later appeal unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work manifest injustice." *Kim-*

ball, 590 F.2d at 771-72 (quoting *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967)). There is no evidence to warrant a departure from the law of the case doctrine. The Council does not argue that jurisdictional issues have changed since the first appeal. Instead they argue that because the district court's second judgment is different from the first, new questions were raised by the second judgment that were not considered by the first panel. Regardless of the merit of this contention, the specific jurisdictional issues determined by the first panel are the same here and the Council fails to produce evidence warranting a departure from the law of the case doctrine. For the purposes of this case, the Council is not protected by tribal or legislative immunity, the state is not required to exhaust tribal remedies, and a justiciable case and controversy has been presented.

DISCUSSION

This case fits into the rationale of our recent decision in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). Initially, it is not disputed that the grant of the Yakima Indian Reservation implies water rights under the *Winters* doctrine. *Winters v. United States*, 207 U.S. 564 (1908). In *Anderson*, the Spokane Tribe argued that they, not the State of Washington, had regulatory jurisdiction over non-Indian use of excess Chamokane Basin waters on non-Indian owned lands located within the Spokane Indian Reservation. The

Chamokane Basin hydrological system includes the Chamokane Creek, its tributaries and its groundwater basin. The Chamokane Creek originates north of the reservation and flows south a considerable distance before encountering the reservation. The creek then forms the eastern boundary of the reservation, separates from the reservation, and flows into the Spokane River. *Anderson*, 736 F.2d at 1361. The *Anderson* court concluded "that the state, not the Tribe, has the authority to regulate the use of excess Chamokane Basin waters by non-Indians on non-tribal, i.e., fee, land." *Id.* at 1365. The court found no consensual agreement between the tribe and the non-Indian water users or conduct which threatened or had such a " 'direct effect on the political integrity, the economic security, or the health or welfare of the Tribe,' as to confer tribal jurisdiction." *Anderson*, 736 F.2d at 1365 (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)).

The *Anderson* court then applied a preemption analysis to determine the State of Washington's authority to regulate the excess waters. The court stated that water contained within the exterior boundaries of an Indian reservation does not necessarily negate the state's obligation to regulate water consumption in conjunction with other state water systems. Washington's regulatory obligation is for the benefit of all its citizens, including those owning fee land within an

Indian reservation. *Id.* at 1366; *see also* 25 U.S.C. § 349. When water is located within the boundaries of both the state and the reservation, the state's interest runs concurrently with tribal concerns. The creek in *Anderson* was not exclusively in the reservation but formed the eastern boundary and then separated from the reservation and flowed into the Spokane River. The hydrology and geography of the Chamokane basin emphasized the State of Washington's interest in developing a comprehensive water code to regulate surplus waters, including excess waters on the reservation. Hence, in balancing the various state, tribal, and federal interests, the court concluded that the state may regulate the excess waters on the Spokane reservation.

The Council argues that the Yakima Indian Nation has the broad power to regulate reservation waters used by non-Indians on deeded land. This argument encompasses more than the narrow regulatory issue that we need presently decide. The district court specifically did not determine which sovereign, federal or state should excess waters.[1] Nor did the court consider

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[1] We are not reviewing or applying a preemption anlysis. Such a review is outside the scope of this action. Nor are we considering the range of authority that the Council has over any reserved water rights. The reservation's water rights are currently being adjudicated in *State of Washington v. Acquavelle,* cause No. 77-2-01484-5. While the state has been issuing water right permits to non-Indian users, we note that these permits are limited to excess water rights and may, in fact, convey no rights at all. *See Anderson,* 736 F.2d at 1365.

the extent to which the Yakima Nation may regulate reserved waters and/or ground waters with or without the concurrence of the United States. The issue on appeal revolves around the district court's holding that the Yakima Nation Water Code is invalid as to the non-Indian use of excess waters on or passing through non-Indian owned land within the Yakima Indian Reservation and, therefore, the Council does not have the authority to enforce the invalid provisions. The thrust of the Council's argument is based on the allegations that tribal regulation of these waters is critical to the lifestyles of the tribe. Nowhere are specific facts alleged to support this contention or the allegation of a lack of any excess water. The Council fails to rebut the district court's specific findings on the existence of excess waters used on non-Indian lands in a situation very similar to *Anderson*. The district court found, and we agree, that the state met its burden of demonstrating a peaceful co-existence of the non-Indian water users with the tribe. The Council failed to produce sufficient evidence to show the non-existence of excess waters or that regulation of excess waters by the State threatened or had a direct effect on the political integrity, economic security, or health and welfare of the tribe. Nor did the Council show that any of the non-Indians entered into a consensual relationship with the tribe that would subject the non-Indian to tribal jurisdiction. We agree with the district court's con-

clusion that under these circumstances, the Council did not have the power to regulate excess water use by non-Indians on non-Indian fee land. Thus, we hold that the Yakima Nation Water Code is invalid to the extent it purports to bestow tribal civil regulatory authority over such use of excess waters.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 84-3541 — DC No. 78-02-JLQ

FRED HOLLY and MARIAN HOLLY, husband and wife, et al.,

Plaintiffs/Appellees,

and

CITY OF TOPPENISH and CITY OF WAPATO, Washington Municipal Corporations,

Plaintiffs-Intervenors/Appellees,

and

WATSON TOTUS, et al.,

Defendants/Appellants.

Appeal from the United States District Court
for the Eastern District of Washington

Honorable Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted September 6, 1984

MEMORANDUM*

BEFORE: WRIGHT, PREGERSON & CANBY, Circuit Judges

Individual members of the Yakima Tribal Council (hereafter "council members") appeal from a summary judgment invalidating the Yakima Water Code and enjoining its enforcement. Council members chal-

* The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit.

lenge the district court's determination that the Code's penal provision, which improperly was made applicable to non-Indians, invalidated the Code in its entirety. Council members also raise the threshold issues of justiciability, standing, legislative and tribal immunity, and exhustion as bars to jurisdiction below.

I. **Threshold issues**

The Code purports to regulate waters claimed by appellants, and includes a filing requirement which, in the event of failure to file, operates as a self-executing abrogation of appellants' interests. Appellees have alleged that the value of their lands is dependent upon these water rights. Appellees have accordingly established both standing and a justiciable controversy. *See Warth v. Seldin*, 422 U.S. 490, (1975); *Western Mining Council v. Watt*, 643 F.2d 618, 628 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Since council members' code vests them with administrative, regulatory, and adjudicatory authorities, the doctrine of legislative immunity does not insulate them from suit. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734-36 (1980). Nor are individual tribal officers "protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). Although council members are correct in contending that habeas corpus represents the sole avenue for federal judicial review of alleged violations of the Indian Civil Rights Act, *id.*

at 67, none of appellees' ICRA claims is presently before us. To require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an entirely futile gesture. *See generally,* K. Davis, 4 *Administrative Law Treatise* § 26:11 (1983); *Southeast Alaska Conservation Council v. Watson,* 697 F.2d 1305, 1309 (9th Cir. 1983).

Finding no bar to jurisdiction below, we affirm the district court's denial of council members' motion to dismiss.

II. **Summary Judgment**

Relying upon *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), the district court correctly found the water code's penal provision inapplicable to non-Indians. We reverse, however, the court's holding that the penal provision was non-severable and voided the code in its entirety. There was no showing of legislative intent to support the conclusion of non-severability. *Oliphant* does not alter the penal provision's applicability to tribal members. Furthermore, even without its criminal sanctions, the remaining civil and regulatory provisions of the code — which may serve as the statutory predicate for legal proceedings — leave " 'what is left . . . fully operative as a law.' " *Buckley v. Valeo,* 424 U.S. 1, 108 (1976) (per curiam)

(quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1934)). .[1]

AFFIRMED in part, REVERSED in part, and REMANDED. Costs in favor of appellants.

[1] In reversing, we express no opinion on the plaintiffs' other challenges to the validity of the tribal water code. The district court has not yet ruled on these issues and we do not reach them.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-002-JLQ

FRED AND MARIAN HOLLY, et al.,

Plaintiffs

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, an Indian Nation or Tribe established by Treaty with the United States, et al.,

Defendants

MEMORANDUM AND ORDER GRANTING STATE'S MOTION FOR SUMMARY JUDGMENT

The procedural background for this water rights action and undisputed facts are set forth in the court's earlier memorandum and will not be repeated. See Ct. Rec. 134. Summarized in that document also is a preliminary discussion of the issues raised by this litigation. This memorandum serves only to memorialize the court's oral ruling of July 11, 1985, that the Confederated Tribes and Bands of the Yakima Indian Nation (Yakima Nation), do not have inherent power to regulate or administer non-Indian excess waters flowing through the Reservation.

By its motion, the state seeks a declaration that the Yakima Nation Water Code (the Code) adopted by the Tribal Council in May, 1977, is invalid. Two years ago, this court so concluded by reason of the penal provisions of the Code which could have been

applied in Tribal Courts against non-Indians. On review, the Ninth Circuit affirmed in part. However, the Circuit, by memorandum, determined the unlawful penal provision did not invalidate the Code in its entirely. Accordingly, the matter was remanded.

Meriting mention is the Yakima Nation's recent contention that the issues before the court are moot because the Yakima Nation has stayed enforcement of the Code and plans to change the promulgation in some respects. Yet, the Code remains in existence, and the claim nonetheless satisfies the elements of the "capable of repetition, yet evading review" exception to the mootness doctrine. *Wiggins v. Rushen*, ___F.2d___, Slip Op. No. 83-1719 (9th Cir. May 17, 1985) citing *Roe v. Wade*, 410 U.S. 113 (1973). That is, the parties may "reasonably" expect to be subjected to the Code at a later date. More significantly, however, the Ninth Circuit, by mandate, has directed the court to address the question of Code validity. Similarly, the Tribe's "exhaustion" contention was decided by the Circuit adversely to the Tribe. As such, that ruling also remains the law of the case.

Preliminarily, it is noted that when the United States sets aside a reservation of land, it impliedly reserves water then unappropriated in sufficient quantity to accomplish the purposes of the federal reservation. *United States v. New Mexico*, 438 U.S. 696, 698-700 (1978). Hence, Indian tribes hold reserved

water rights. *Winters v. United States*, 207 U.S. 564, 577 (1908). Unlike appropriative rights created under state law, which are defined by actual diversion and continued beneficial use of waters from natural channels, Indian *Winters* rights reserve a paramount right to the use of as much water which is in contact with the reservation as is needed to fulfill the primary purposes for which the land was reserved. *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) (*Walton* II). "Excess" waters are those stream waters, to be distinguished from ground water, which are over and above those used to satisfy *Winter* rights. 647 F.2d at 327.

The Code in question is comprehensive, purporting to regulate all waters underlying, arising upon or flowing through or along the border of the Reservation. To determine whether the Yakima Nation's sovereign power is sufficient to apply its Code to nonmembers of the Tribe using excess waters on fee lands requires analysis under *Montana v. United States*, 450 U.S. 544 (1981). While Indian tribes possess inherent sovereign power over their members and their territory, 450 U.S. at 563, due to their "original incorporation into the United States," exercise of tribal power beyond that necessary to protect tribal self-government is deemed inconsistent with its "dependent status". 450 U.S. at 464-65. Therefore, such inherent power was

held not to survive without express congressional delegation. 450 U.S. at 564-65. Because tribes may not exercise power inconsistent with this diminished sovereign status, Indians have lost the right to govern nonmembers residing within Reservations except in certain instances. 450 U.S. at 565. More importantly in this case, a tribe also retains inherent power to civily regulate the conduct of non-Indians on fee lands "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.[1]

Significantly, in a case arising in this district, the reviewing court held that conduct threatening the health or welfare of an Indan tribe may include conduct involving the tribe's water rights. *Walton* II, 467 F.2d at 52. In *Walton*, a non-Indian's water appropriation imperiled the Colville Confederated Tribes' downstream use of agricultural and fisheries water. On the other hand, a contrary conclusion was reached, under different circumstances, in a later action also initiated in this district. See, generally, *United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984) (political and economic welfare of the Spokane Tribe unaffected by the conduct of nonmembers using excess water on fee land).

[1] This retained civil authority over non-Indians is not only a self-government notion, but also derives form the power to exclude nonmembers from tribal land. *United States v. Anderson*, 736 F.2d 1358, 1364 (9th Cir. 1984).

Here, for purposes of this motion, it is undisputed that surplus waters exist and are used by non-Indians on Reservation fee land and off the Reservation.[2] As the facts demonstrate, the state has met its burden of demonstrating a peaceful co-existence of the non-Indian water users with the Tribes. The Yakima Nation has not come forward with facts to show existence of a material factual question with respect to whether non-Indian conduct related to non-Indian use of excess waters threatens the political integrity, economic security, or health and welfare of the Tribes. Nor have the non-Indians entered into agreements or dealings with the Tribes with a result of subjecting themselves to tribal civil jurisdiction. Consequently, the inescapable conclusion is the Yakima Nation has not retained the power to regulate excess water use by non-members on their fee land within or without the Reservation. It follows, then, that the Code is invalid to the extent

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[2] Although the existence of excess waters is stipulated, Ct. Rec. 134 at 8, such waters have only been partly quantified. That is, in the Glenwood Area a general adjudication (quantification) occurred in *In the Matter of the Determination of the Rights to the Use of Bird & Braser Creeks. State v. Bartholomew, et al.,* Klickitat County Washington Superior Court Decree entered March 14, 1921. See Stipulated Fact 8, Ct. Rec. 134 at 6. The various remaining water systems, which serve users within and without the Reservation, are currently undergoing general adjudication in *State v. Aquavella,* Yakima County Superior Court Cause No. 77-2-01484-5 (Stauffacher J.).

For purposes of this motion, the court considers the Glenwood area as within the Reservation boundaries.

it purports to bestow upon the Yakima Nation civil regulatory jurisdiction over non-Indians of surplus waters.

In so concluding, this court has not been asked to determine which sovereign, federal or state, should regulate excess waters. Such a consideration is outside the scope of this action, as it would require a pre-emption analysis informed by detailed factual development with the participation of the United States as a party. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). (Analysis of whether a state may regulate non-Indian conduct on a Reservation requires "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context the exercise of state authority would violate federal law.")[3] See, also, Ct. Rec. 134 at 20. Nor does

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[3] After concluding, under a *Montana* analysis, that the economic welfare of the Colvilles was threatened by Non-Indian use of the unitary water system in *Walton* II, the panel went on to additionally hold, under a pre-emption mode, that the state could not regulate water in that system. 647 F.2d at 52. Factually, this was so because the stream was small, non-navigable, and flowed entirely within the Reservation. 647 F.2d at 53. Although some land served by the unitary, adjudicated stream system was in non-Indian ownership, it was also within Reservation boundaries. Finally, the non-Indian lands were purchased allotted lands rather than public domain lands. 647 F.2d at 53 & n.16. Under its narrow ruling, the court found it unnecessary to decide whether the regulatory power resided exclusively in the Tribe, in the federal government, or whether it was to be exercised jointly. 647 F.2d at 52. It simply concluded the state could not regulate because tribal and/or federal control did not impact off-reservation state water rights. 647 F.2d at 53.

In *Anderson,* 736 F.2d at 1365-66, the state was not pre-empted from exercising its regulatory jurisdiction over the use of surplus, non-reserved waters by non-members on non-fee lands within the Spokane Reservation. The "particularized inquiry", *Bracker,* 448 U.S. at 145, of the stat's interest, in the context of an adjudicated stream system which continued for a considerable length outside the reservation weighed heavily against the competing federal and tribal interests. 736 F.2d at 1366. As discussed in this court's earlier Order, Ct. Rec. 134 at 15-17, the state, tribal and federal interests in this case are unlike the factual underpinnings of *Walton* II or *Anderson.*

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the court decide the extent to which the Yakima Nation may regulate reserved waters and/or ground waters with or without the concurrence of the United States.

Lastly, the court is mindful of the Circuit's recent teachings in *South Delta Water Agency v. United States,* ____F.2d____, slip op. 84-1758 (9th Cir. July 26, 1985), decided after this court's oral ruling in the instant case. In *South Delta,* an action not directly involving Indian water rights, public and private water use holders brought a declaratory action against the federal and California governments alleging defendants were operating their facilities in a manner which violated plaintiffs' federal and state law rights. Logically, opined the reviewing court, where "there has been no prior adjudication of relative stream water rights," a court cannot adjudicate the administration of those rights within the meaning of the McCarran Amendment (43 U.S.C. § 666(a)(2)). *South Delta,* slip op. at 18-19. However, in so concluding, the appellate court nonetheless found trial court jurisdiction to

hear the matter against the United States, because the McCarran Amendment was not meant to address "the entire field of water law litigation involving the federal government." *South Delta* at 20. More importantly here, the Circuit has already resolved the threshold jurisdictional issue by mandating this court address the water rights administration question, in this case, Code validity.

IT IS ORDERED the state's Motion for Summary Judgment, joined by the municipal and individual plaintiffs, is GRANTED. The Clerk of the Court is directed to enter judgment that the Yakima Nation Water Code, adopted in May, 1977, is invalid as to non-member use of excess waters on or passing through the Yakima Indian Reservation.

DATED this 6th day of September, 1985.

ss._____

JUSTIN L. QUACKENBUSH
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-002-JLQ

FRED AND MARIAN HOLLY, husband and wife

Plaintiffs

vs.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, et al.,

Defendants

ORDER DENYING MOTION TO AMEND EXCEPT FOR *NUNC PRO TUNC* CORRECTIONS OF SEPTEMBER 6, 1985 MEMORANDUM AND ORDER AND JUDGMENT

THIS ORDER shall serve to memorialize the court's oral ruling of November 18, 1985, denying, in greater part, defendants' Motion to Amend Judgment. Defendants are tribal officials sued for injunctive relief in their individual capactities. In essence, defendants complain this court's memorandum decision that the Yakima Nation's Water Code of 1977 is invalid as to non-member use of excess waters is not a judgment against individuals. Rather, argue defendants, this holding has nothing to do with the individual defendants and instead strikes at the Yakima Nation which is immune from suit.

The issues of jurisdiction, exhaustion, and immunity have been thoroughly briefed, argued and ruled upon, not only by Judge Neill and by this judge, Ct.

Rec. 55, 134 and 168, but also by the Ninth Circuit Court of Appeals in its unpublished memorandum, *Holly v. City of Toppenish*, CA-84-3541, dated October 22, 1984, which Order is now the law of the case.

As the reviewing court clearly held, since the challenged Code vests defendants with "administrative, regulatory, and adjudicatory authorities," CA-84-3541 at 2, the doctrines of legislative and tribal immunity do not shield the officials, individually, from suit. Accordingly, the reviewing court, which reversed this court's earlier decision in part, affirmed denial of defendants' motion to dismiss and remanded the case for further proceedings. Under the circuit's holding, it was then necessary for this court to again evaluate the validity of the Code to determine whether defendants should be enjoined from acting in their executive and administrative capacities by way of enforcing the Code against non-member use of excess waters. Indeed, this court is unaware of a way to comply with the circuit's directive except by determining the validity of the Code. This is so notwithstanding the exhaustion principles enunciated in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, ____U.S.____, 53 U.S.L.W. 4649 (June 3, 1985) decided after the circuit's decision in this action. In *Crow Tribe* at n.21 and the accompanying text, the high Court concluded the "existence and extent" of "tribal court" jurisdiction should be examined "in the first instance" by "the

Tribal Court itself" except where "exhaustion would be futile." As held by the Ninth Circuit in the instant matter, "[t]o require exhaustion of tribal remedies where the tribe's water code expressly asserts the very authority appellees dispute would also be to compel an *entirely futile gesture.*" Emphasis added. CA No. 84-3541 at 2.

In so concluding, however, it is appropriate to add the following clarifying language to the court's Order dated September 6, 1985. At page 5, lines 12-13 of Ct. Rec. 168, the word "defendants" is substituted for the term "The Yakima Nation." Also, the following sentence is added at the end of the first paragraph, line 11, at page 6. "Thus, to the extent defendants seek to administrate, regulate, and adjudicate non-Indian use of surplus water, under the power of the Code, defendants are proceeding without authority and are not insulated from suit. *Holly v. City of Toppenish,* CA-84-3541 Unpublished Memorandum (9th Cir. 10/22/-84); Ct. Rec. 55 at 2 and 134 at 2." Lastly, at page 8, line 21, the following sentence is substituted for the last sentence in the paragraph: "The Clerk of the Court is directed to enter judgment that since the Yakima Nation Water Code, adopted in May, 1977, is invalid as to non-member use of excess waters on or passing through the Yakima Indian Reservation, defendants do not possess authority to enforce the void provisions." To this extent, also, the court's Judgment, at Ct. Rec.

169, dated September 6, 1985, is AMENDED, *nunc pro tunc.*

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 20th day of November, 1985.

ss._____

JUSTIN L. QUACKENBUSH
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
No. C-78-2

FRED HOLLY AND MARIAN HOLLY, husband and wife, et al., ex ux,

Plaintiffs,

-vs-

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, an Indian Nation of Tribe established by treaty with the United States, et al.,

Defendants.

CITY OF TOPPENISH AND CITY OF WAPATO WASHINGTON MUNICIPAL CORPORATIONS,

Intervenors.

MEMORANDUM AND ORDER

This action is brought by the State of Washington and by individual non-Indians and corporations who allegedly own land either within or near the Yakima Nation Reservation within the State of Washington. Defendants include the Yakima Indian Nation, the Yakima Tribal Council, all members of the Tribal Council individually and in their official capacities, and the Chief Judge of the Tribal Court, individually and in his official capacity.

Plaintiffs seek to enjoin the application and enforcement of the Yakima Nation Water Code, adopted by the Tribal Council in May, 1977. Plaintiffs assert that defendants do not have jurisdiction over the land, real property interests or water rights of plaintiffs and

that application of the Code to plaintiffs would violate their rights under federal law.

Defendants move to dismiss asserting that defendants are immune from suit because of sovereign immunity; that the action is not ripe because of failure to exhaust tribal remedies; that this Court has no jurisdiction over defendants; and that the plaintiffs have failed to state a claim upon which relief can be granted.

The Supreme Court has recently dealt with the issue of tribal immunity from suit in federal courts. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). In *Martinez* the Court held that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§1301-1303 (1970), did not abrogate Indian tribes' sovereign immunity. In light of the Supreme Court's reasoning in *Martinez,* no other statute may be deemed to have waived such sovereign immunity. *Martinez* indicates that officers of the tribes are not covered by this immunity, although the opinion does not deal with this issue in detail. This Court concludes that the approach applied to immunity of federal officers also must be applied to tribal officers. This approach permits officers to be sued in their individual capacities when they act outside of their authority or when the authority under which they act is void. *See Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949).

Therefore this Court holds that it has no juris-

diction over the Yakima Indian Nation, over the Yakima Tribal Council, or over the tribal officials in their official capacities. However, because plaintiffs have in effect alleged that tribal officials' authority under the Yakima Water Code is void under federal law, the claims for relief against these tribal officials in their individual capacities is not barred by sovereign immunity.

This Court also concludes that the action against the Chief Judge of the Yakima Tribal Court must be dismissed. There is no present controversy with the Tribal Court or the Judge. The role of the Tribal Court under the Water Code is to enforce criminal penalties for violations. In light of a recent Supreme Court decision, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), it is doubtful that the Tribal Court has any criminal jurisdiction over the non-Indian plaintiffs or that any charges would be filed against them. No charges have been filed nor has prosecution been threatened. Thus, any action by the Tribal Court against the plaintiffs in the future is speculative, and interference by this Court is not warranted. *See Boyle v. Landry*, 401 U.S. 77 (1971).

In contrast, the controversy with the tribal officials is ripe for adjudication. The Water Code requires the plaintiffs to submit their water claims to the Tribal Council by the end of 1978 or to risk losing these claims. The Tribal Council officers will administer the

Water Code. The impact of the Code through the actions of these tribal officers is thus sufficiently immediate and direct to permit adjudication of plaintiffs' challenge. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967).

Plaintiffs allege six separate claims for relief and state a basis for federal jurisdiction over each claim.

The first claim is that a correct interpretation of the Treaty with the Yakimas, 12 Stat. 951, will establish that the Yakimas have no authority to regulate or affect plaintiffs' rights to water. Plaintiffs allege jurisdiction under 28 U.S.C. §1331 (federal question) for this claim.

Second, plaintiffs claim that the Code is void because it was adopted without authority, as federal statutes reserve such authority to the United States. These statutes include 25 U.S.C. §§ 2, 9, 70u and 381. Plaintiffs assert that 28 U.S.C. §1331 also provides for jurisdiction over this claim.

Third, plaintiffs allege that the Water Code deprives plaintiffs of the full and equal benefit of the laws of the State of Washington concerning real property and therefore violates 42 U.S.C. §§1981 and 1982. Plaintiffs allege jurisdiction under 28 U.S.C. §§1343(4) and 1331.

Fourth, plaintiffs allege a taking of property in violation of the Fifth Amendment to the United States Constitution and of 25 U.S.C. §1302 (Indian Civil

Rights Act), resulting in federal jurisdiction under 28 U.S.C. §1331.

Fifth, plaintiffs allege that provisions of the Code discriminate against them on the basis of race in violation of 25 U.S.C. §1302 (ICRA) and 42 U.S.C. §§1981 and 1982, creating federal jurisdiction under 28 U.S.C. §1343(4).

Sixth, plaintiffs argue that the United States Constitution generally, and specifically in the Tenth Amendment, protects the plaintiffs from the exercise of governmental authority by non-federal and non-state entities including the tribe. Plaintiffs allege federal jurisdiction under 28 U.S.C. §1331.

Plaintiffs also allege that 22 U.S.C. §2201 confers jurisdiction to grant declaratory relief.

This Court has federal question jurisdiction over claims "wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. The first claim of the plaintiffs, that the tribal officials' regulation is void under the Treaty with the Yakimas, 12 Stat. 951, arises under federal law and this Court has jurisdiction over it under §1331. The second claim, that the regulation is void under statutes reserving such authority to the United States, also arises under federal law.

Defendants contend that this Court lacks federal

question jurisdiction over these claims concerning the treaty and the federal statutes because of the "well pleaded complaint" rule. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 676 (1974), reaffirming the rule stated in *Taylor v. Anderson*, 234 U.S. 74 (1914). Defendants assert that plaintiffs are alleging rights to water based on state law, and that the allegations concerning the treaty and federal statutes are in anticipation of a defense and therefore cannot be relied upon to establish federal jurisdiction.

This action, however, is not based on state law. This is not an action to quiet title to water or an action in ejectment. The action challenges the very basis of the Yakima Tribe's claimed jurisdiction over all waters within the Yakima reservation. The extent of tribal jurisdiction is governed both by the federal treaty with the tribe and in addition, because Congress retains plenary power over Indians, by subsequent federal statutes affecting the tribe. The federal law thus is an integral part of the complaint and not merely of the defense, and the well pleaded complaint rule does not bar jurisdiction. The action arises under federal law, both treaty and statute, because the right asserted "will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Gully v. First National Bank*, 299 U.S. 109, 112 (1936).

The Court also holds that the amount in contro-

versy requirement is satisfied. The standard for determining whether jurisdictional amount exists is stated in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938).

> It must appear to be a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

In suits for injunctions or declaratory relief, the value of the amount in controversy is the value of the object of the suit. *See Mississippi & M. R. Co. v. Ward*, 67 U.S. 485 (1892). *See generally*, 1 Moore's Federal Practice § 0.96. Here the object is protection of plaintiffs' alleged rights to water against allegedly unlawful regulation by the defendants. The appropriate measure of this value is the value of this water. Each plaintiff alleges that his or her land is valued at over $10,000; that this land is virtually valueless without water rights; and that their water rights are affected and possibly extinguished by the Water Code. These allegations are sufficient to establish the jurisdictional amount. This conclusion is not altered by *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966). There the funds asserted to provide the jurisdictional amount were not the object of the suit but were a hoped-for collateral effect of the litigation. It is well established that such collateral effects cannot form the basis for jurisdictional amount.

The defendants further argue that plaintiffs must exhaust their tribal remedies before any action can

be maintained in federal court. This Court holds that no exhaustion is required as to the claim that the tribe lacks jurisdiction over plaintiffs' waters.

The general rule is that exhaustion requirements apply to administrative remedies, and not to judicial ones. *See McNeese v. Board of Ed. for Community Unit School Dis. 187*, 373 U.S. 668 (1963). Thus, even if plaintiffs have a remedy in tribal court under the Indian Civil Rights Act, the availability of that remedy does not bar assertion in federal court of separate federal remedies.

Under the Tribal Water Code plaintiffs may submit their claims to the Water Board and may appeal any decision of the Board to the Tribal Council. Defendants argue that the plaintiff should exhaust these administrative remedies prior to suing in federal court. However, plaintiffs argue that these tribal agencies lack jurisdiction over their claims. There is no indication that these administrative bodies have the power to entertain the claim that under federal law tribal agencies have no power to affect plaintiffs' water rights. Tribal agencies, in contrast to federal courts, have no special expertise in interpreting federal treaties and statutes; thus there is no policy basis for deferral to tribal agencies' determinations of these issues. For all these reasons, exhaustion of tribal administrative remedies is not required here. *See Public Utilities Commission of Cal. v. United States*, 355 U.S. 534

(1958); *McKart v. United States*, 395 U.S. 185 (1969).

Thus, the Court has concluded that it has jurisdiction over the issue of whether, under federal law, the tribe has jurisdiction over the plaintiffs' waters. Given this holding, the Court at this time need not determine whether it has jurisdiction over the other claims, or whether they must be dismissed for failure to state a claim upon which relief can be granted. If the Court finds that the tribe has no jurisdiction over these waters, the other claims are moot. On the other hand, if the Court finds that the tribe does have jurisdiction over these waters, defendants may renew their motion to dismiss. The Court will determine at that time whether tribal power is limited by these other laws. In the meantime the Motion to Dismiss these other claims is DENIED without prejudice to its renewal after determination of the issue of the tribe's jurisdiction.

Defendants' Motion to Dismiss is DENIED.

DONE BY THE Court this 31st day of January, 1979.

MARSHALL A. NEILL
United States District Judge

APPENDIX E

TREATY WITH THE YAKIMAS, 1855

12 Stat. 951, June 9, 1855—Treaty

Preamble

Articles of agreement and convention made and concluded at the treaty ground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned head chief, chiefs, headmen and delegates of the Yakama, Palouse, Pisquose, Wenatchapam, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skinpah, Wish-ham, Shyiks, Oche-chotes, Kah-milt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occuping lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "Yakama," with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

. . . .

ARTICLE II. There is, however, reserved from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

[Description of Yakima Indian Reservation]

. . . .

All of which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the Superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States, to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

And provided, That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated, and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued, under the direction of the President of the United States, and

payment made therefor in money; or improvements of an equal value made for said Indian upon the reservation. And no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money, or improvements of an equal value shall be furnished him as aforesaid.

APPENDIX F

25 U.S.C. § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines,

inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Apr. 11, 1968, P. L. 90-284, Title II, § 202, 82 Stat. 77.)

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.

(Apr. 11, 1968, P. L. 90-284, Title II, § 203, 82 Stat. 78.)

APPENDIX G

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treates of the United States.

(June 25, 1948, ch 646 § 1, 62 Stat. 930; July 25, 1958, P. L. 85-554, § 1, 72 Stat. 415; Oct. 21, 1976, P. L. 94-574, § 2, 90 Stat. 2721; Dec. 1, 1980, P. L. 96-486, § 2(a), 94 Stat. 2369.)

28 U.S.C. § 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42 [42 USCS § 1985];

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(June 25, 1948, c. 646 § 1, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, P. L. 85-315, Part III, § 121, 71 Stat. 637.)

28 U.S.C. § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS § 7428], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(June 25, 1948, c. 646, § 1, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, P. L. 85-508, § 12(p), 72 Stat. 349; Oct. 4, 1976, P. L. 94-455, Title XIII, § 1306(b)(8), 90 Stat. 1719.)

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NO. C-78-02

FRED HOLLY, et ux., et al.

Plaintiff,

v.

WATSON TOTUS, et al.,

Defendants,

STATEMENT PERTAINING TO MOTION FOR SUMMARY JUDGMENT OF THE STATE OF WASHINGTON, DATED MAY 28, 1982.

Pursuant to Local Rule 13 of the Court and for the sole purpose of consideration of the motion for partial Summary Judgment of the State of Washington and the other plaintiffs, dated May 28, 1982, and for no other purpose whatever the parties to this proceeding agree to the following statement of facts:

1. The Yakima Indian Reservation was established and reserved by treaty with the United States in 1855 (12 Stat. 951).

2. The Confederated Tribes and Bands of the Yakima Indian Nation, herein called the "Yakima Indian Nation," has been recognized as an Indian tribe by the Secretary of the Interior. The Yakima Tribal Council is the governing body of said tribe and is so recognized by the Secretary of the Interior.

3. The individual defendants are elected and duly qualified and acting members of the Yakima Tribal

Council. As members of the Yakima Tribal Council, they collectively prepared, promulgated, and made effective the Yakima Nation Water Code. Resolution No. T-79-77. (A copy thereof is set forth in Exhibit A.) This code applies to all areas within the Yakima Indian Reservation. The scope of coverage of the Code as intended by the Yakima Indian Nation includes the Glenwood area.

4. The Glenwood area is an area of 100,457 acres located in the south-central part of the State of Washington and immediately southeast of Mount Adams. Beginning in the 1880s, it was substantially and predominantly settled by non-Indians. Patents were issued to these settlers by the United States in the late 19th or early 20th century under the federal homestead laws on the assumption that the land in this area was part of the public domain. In 1947 the Yakima Tribe filed a claim with the Indian Claims Commission of the United States demanding compensation for these and other lands on the ground that there had been a taking under the power of eminent domain or a violation of the 5th Amendment to the United States Constitution. Petition filed June 21, 1949. *The Yakima Tribe* v. *U.S.*, Indian Claims Commission Docket No. 47. It was asserted that these lands were part of the Yakima Indian Reservation, that patents had been issued and the lands otherwise disposed of inadvertently and that the assumption that the lands were part of

the public domain was erroneous. *id.* The claim was upheld as to a 121,466 acre tract. (Identified as Tract D in the Indian Claims Commission proceedings.) 16 Ind. Cl. Cmsn. 426. A 21,009 acre portion of that tract was severed into a separate claim. The remainder of the tract is what is identified here as the Glenwood area. It was agreed by the Tribe and the United States that vacant and unpatented lands in the Glenwood area, containing some 2,548 acres, were to be returned to the tribe. These lands were eliminated from the money portion of the claim. The claim for money judgment was agreed to apply to the remaining 97,909 acres which had been patented. 20 ICC 76, 77, 78, 79. The United States was found liable on the claim for the patented acres. The Yakima Tribe received a judgment for this and other claims in a consolidated judgment. 20 ICC 90, 95, 96. None of the plaintiffs were parties to the proceedings before the Indian Claims Commission.

5. The Yakima Indian Reservation, exclusive of the Glenwood area, contains 1,223,844 acres. This land is held as follows:

Tribal land and alotted land held in trust by the United States	1,121,220 acres
Fee land held by Indians	3,202 acres
Fee land held by non-Indians	99,422 acres
TOTAL	1,223,844 acres

For the most part the fee lands held by non-Indians

were transferred to non-Indians pursuant to the Federal Allotment Acts. The land ownership of the Yakima Indian Reservation is set forth on Exhibit B, a map of the Yakima Indian Reservation prepared by the Bureau of Indian Affiars.

6. The non-governmental plaintiffs are non-Indian citizens of the State of Washington. They claim ownership of the land and are users of water in the Glenwood area.

7. Plaintiff State of Washington is a state of the United States, admitted to the Federal Union in 1889. It (through various state departments) claims ownership of land and water rights and is a user of water in the area which the Yakima Nation claims is within the purview of the Yakima Nation Water Code. The State of Washington, through the Department of Ecology, administers the state's water right laws.

8. In relation to the use of water within the Glenwood area, several individual plaintiffs hold permits or certificates issued by the State of Washington pursuant to Chapter 90.03 RCW or otherwise claim the right to use waters within the Glenwood area based on state law. Several individual plaintiffs also claim rights to use the water within the Glenwood area pursuant to decree of the Klickitat County Superior Court issued in accordance with the general adjudication procedures of Chapters 90.03 or 90.44 RCW or rights established otherwise under state law. *In the Matter of the Deter-*

mination of the Rights to the Use of the Waters of Bird and Fraser Creeks. State v. *Bartholomew, et al.* Klickitat County Washington Superior Court Decree entered March 14, 1921. Exhibit C. For more than 50 years waters have been allocated in accordance with this decree.

9. The Yakima Indian Nation and its members have reserved treaty water rights to the use of waters within the exterior boundaries of the Yakima Indian Reservation. See *Winters* v. *United States*, 207 U.S. 564 (1908).

10. The Yakima Indian Nation has promulgated that all of the waters that underlie, arise upon or flow through or along the border of the Yakima Indian Reservation are reserved for the beneficial use of its members as needed. At the present time, however, parts of those waters are used both within and outside the boundaries of the Reservation by non-Indians.

11. The United States Department of the Interior has neither approved the Yakima Water Code nor, at any time, adopted any comprehensive code or regulation purporting to allocate or regulate waters within the reservation. The Yakima Indian Nation has been advised that the Yakima Nation Water Code will not be approved by the Department of the Interior until regulations are adopted by it pursuant to 25 USC Sec. 381. Since enactment of 25 USC Sec. 381 by Congress

in 1887, the Department of the Interior has failed to adopt such regulations.

12. Enforcement of the Yakima Nation Water Code has been stayed since the inception of this case. The Yakima Nation Water Code has not, at any time, before the commencement of this suit or thereafter, been enforced by the Yakima Indian Nation against any of the plaintiff.

DATED this 28th day of May, 1982.

ss._____
DONALD H. BOND
Attorney for non-State
Plaintiffs

ss._____
CHARLES B. ROE, JR.
Senior Assistant
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ss._____
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